1995

Sheree Hewett v. D&S Corporation dba, Intermountain Printing/Type Tech : Brief of Appellant

Utah Court of Appeals

Timothy W. Blackburn; Van Cott, Bagley, Cornwall & McCarthy.
Robert A. Echard; Robert A. Echard & Associates.

IN THE UTAH COURT OF APPEALS

SHEREE HEWETT,	)	
	)	
Plaintiff/Appellee,	)	
vs.	)	
	)	
D&S CORPORATION dba,	)	
INTERMOUNTAIN PRINTING/	)	No. 950347-CA
TYPE TECH,	)	
	)	Priority - 15
Defendant/Appellant.	)	

APPELLANT'S BRIEF

Appeal from Second Judicial District Court
of Weber County, State of Utah
The Honorable Michael D. Lyon, District Court Judge

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STATEMENT OF JURISDICTION

The jurisdiction of the Utah Supreme Court is founded upon U.C.A. 78-2-2(j). This case has been assigned to the Court of Appeals by the Supreme Court.

STATEMENT OF THE ISSUES

I. Did the appellee, (Hewett) breach her covenant to repair the leased property and did said breach constitute a constructive eviction justifying Thomas in withholding rent and eventually terminating the lease? The trial court's determination that there was not a constructive eviction is a conclusion of law which is not entitled to any deference on appeal. Zions First National Bank v. National American Title Insurance Co., 749 P.2d 651 (Utah 1988). The standard of review for a finding of fact is that of substantial evidence.

The Defendant preserved this issue in its answer to the Plaintiff's complaint and during closing and opening arguments. (TR. 10-15, 305-324).

II. Was the appellant's (Intermountain) duty to pay rent dependant on the appellee (Hewett) fulfilling her obligation to make repairs which she had expressly covenanted for in the lease

agreement. If a contract is unambiguous, interpretation of the contract is a question of law, which we review for correctness. Kimball v. Campbell, 669 P.2d 714, 716 (Utah 1985). The standard of review for the finding of fact is that of substantial evidence. The standard for review of conclusions of law is correctness wherein the appellant court decides the matter for itself.

The Defendant preserved this issue in its answer to the Plaintiff's complaint and during closing and opening arguments. (TR. 10-15, 305-324).

III. Did the appellee, (Hewett) act in a commercially reasonable manner to mitigate damages after the appellant (Intermountain) abandoned the property? The standard of review for the finding of fact is that of substantial evidence.

The Defendant preserved this issue in its answer to the Plaintiff's complaint and during closing and opening arguments. (TR. 10-15, 305-324).

DETERMINATIVE PROVISIONS

The appellant is not aware of any constitutional provisions, statutes, ordinances, rules or regulations whose interpretation

is determinative of the issues on appeal.

STATEMENT OF THE CASE

This matter came on for hearing before the Honorable Michael D. Lyon of the Second Judicial District Court of Weber County, State of Utah, Civil No. 940900191. The trial court granted a judgment in favor of the appellee (Hewett) and against the appellant (Intermountain) for lease payments due under a lease agreement dated January 21, 1991. A notice of appeal was filed on the 20th day of March, 1995 and this case was assigned to the Court of Appeals by the Utah Supreme Court.

STATEMENT OF FACTS

1. The appellant hereinafter referred to as "Intermountain" entered into a lease agreement with the appellee, hereinafter referred to as "Hewett" to lease property located at 3772 Washington Boulevard beginning February 11, 1991 for a period of five years. (TR. 241; Exhibit P1).

2. Responsibility for maintenance of the building was apportioned in the lease agreement such that Hewett's duty for

maintenance of the property included care of the roof, exterior walls, paint, structural repairs of the building, yard surfacing, plumbing, and electrical. Intermountain's duty for maintenance of the property included the interior walls, interior decorating, light globes and glass breakage. (TR. 77-78, 251; Exhibit P1).

3. Prior to Intermountain leasing the building it had been used by Hewett as a beauty salon. (TR. 70).

4. Upon leasing to Intermountain, Hewett removed the salon equipment which would not be used in Intermountain's printing operation. Hewett's removal of the salon equipment resulted in large holes in the counter tops where sinks had once been, plumbing fixtures plugged off and exposed, wiring exposed from where the telephone system had been removed, and marks and scratches on the floor tile from moving the items. (TR. 163, 188, 241-42).

5. During the time Intermountain operated its business out of the building, dust and dirt continually blew into the building through the foundation and window casings due to the structure being improperly sealed. (TR. 235-238, 243).

6. In the spring of 1991, Hewett completed the landscaping and installed a sprinkling system on the property as per the lease agreement. (TR. 251-252). Shortly after the sprinkling

system became operational, water began to leak inside the front of the building. (TR. 252, 277). Intermountain notified Hewett of the leaking caused by the sprinkling system at the time it became aware of the problem and numerous other times throughout the lease period, but Hewett took no measures to correct the problem. (TR. 252).

7. In March 1993, Intermountain voluntarily vacated the building for business reasons and enlisted the services of a real estate agency to sublet the building. (TR. 242-243). After moving its equipment out of the building Intermountain thoroughly cleaned the building to prepare it for showing to potential tenants. Intermountain had the building cleaned three or four more times during the months the real estate agent was attempting to sublet the property. (TR. 282).

8. The realtor determined that $900 was a fair market price for the lease at the time of signing in January 1991 and that since that time, the market value for leasing commercial property had gone up making $970 a reasonable price in subleasing the property. (TR. 213).

9. The realtor, Gary Charlesworth, was an associate broker for Wardley Real Estate and was a licensed general contractor. (TR. 185-186). The realtor was familiar with the property having

seen it prior to the time that it had been leased to Intermountain. The realtor noticed that the foundation in the front of the building had a crack in it and that the rear overhang of the building had severe water damage and was badly deteriorated. He also noticed evidence in the interior of water damage in the form of stains on the floors, water marks on the walls, ceiling and window frames, and the floor tiles buckling from moisture being underneath them. (TR. 194-200). The real estate agent spoke with Hewett during the latter part of 1993 and told her there were problems in the building. Hewett hung up on him. (TR. 190).

10. Charlesworth observed water damage to the exterior of the building on the back side. A hill sloping down toward the back of the building allowed water to run down the hill and caused damage to the exterior of the building from ground level up the side of the structure about two or three inches. (TR. 205-206). Charlesworth observed water actually on the floor of the building where it had leaked in between the foundation and the wall and under the door. (TR. 217-18). Charlesworth also observed that the foundation and the structure of the building itself were not tightly sealed together allowing dust and water to enter the building. (TR. 209-10).

11. Charlesworth observed in August, 1993 and during the time of the trial that the roof overhang in the back of the building evidenced a leak that had caused the sheetrock to dissolve and turn to mush and the paint to separate from the sheetrock. This condition existed for approximately one-half of the width of the building. (TR. 194-197. Charlesworth observed a water stain running down the side of a exposed beam inside of the building and observed that the wood shingles on the building had not been properly maintained and had twisted and separated from the other shingles. (TR. 200, 207-208).

12. Charlesworth testified that the evidence of water leakage would interfere with the ability to relet the property if it was not repaired. (TR. 207).

13. A real estate agent for Wardley by the name of Sharon Hoel also inspected the property and showed the property to approximately six (6) interested parties. In the summer of 1993, she showed the property to a client who was interested in leasing the property. As a result of questions asked when the property was inspected, Sharon Hoel sent a fax to Intermountain outlining some of the problems with the property and indicating that the prospective customer was not interested because of the problems. (TR. 131-133, Exhibit P23). None of the six (6) people the

property was shown to were interested in leasing the property because of the problems and its condition. (TR. 153-154). Intermountain reduced the asking price from $970.00 per month down to $680.00 and still could not get anyone to lease the property because of the condition of the building. (TR. 214).

14. Upon receiving the August 1993 letter, Intermountain's president, Dave Thomas, went to the property and observed evidence of water damage in the form of water stains on the ceiling and floor in several locations, floor tiles buckling near the front of the building, severe water damage to the roof overhang on the exterior of the building, a crack in the foundation and poorly sealed window casings which allowed dirt and water to enter the interior of the building. (TR. 245-248). In the first week of September, 1993, Intermountain sent a list of the problems and needed repairs to Hewett. (TR. 249-250, Exhibit P2). Hewett responded to Plaintiff's Exhibit 2 by writing on the bottom of it saying that she did not intend to do any repairs until the rent had been brought current. (Exhibit P2).

15. Intermountain's president, Dave Thomas, sent a letter to Hewett dated September 14, 1993 outlining the problems with the building and the difficulty of leasing it in its condition.

(Exhibit P3). Hewett responded by letters dated September 15, 1993 and October 5, 1993 indicating that upon receipt of the rent she would make the repairs she was responsible for under the terms of the lease. (Exhibit P4 and P5, TR. 250-251, 253, 255-256).

16. Intermountain's realtor gave Hewett a key to the building in September 1993. (TR. 155).

17. On the same day she received the key, Hewett and a realtor, Dana Hales, went through the building to inspect it and although there was no water on the floor at that time, there were mineral deposits on the floor where water had been, the building was dusty from standing vacant, and there was a crack in the foundation. (TR. 75-78). Hales did not inspect the building and did not have anyone inspect the building. He did what he described as a walk-through. (TR. 38-39).

18. Hewett's attorney wrote two (2) letters to Intermountain, one dated November 5, 1993 and one dated November 30, 1993. In both of those letters, Hewett's attorney stated that Hewett would make the repairs to the property as soon as the rents were brought current. (Exhibit P6 and P7).

19. In November 1993, Intermountain brought all rent payments current but no repairs were made to the building as was

promised by the Hewett and her attorney in their letters. (TR. 254-255).

20. After receiving rent for December, Hewett made no repairs to the building and in December 93 or early January 94 Intermountain sent the key to the building back to Hewett and thereafter had no key to the building. (TR. 282).

21. Intermountain's president, Dave Thomas, made the rent payments with the understanding that the repairs would be performed. When they were not, he spoke to Hewett's attorney who told him, " . . . and he told me if I brought the rents current, that he would see to it that the damage would be repaired." (TR. 256-257). In February or March, 1994, at the request of Hewett's attorney, Timothy Blackburn, Thomas met with Blackburn at the property and pointed out some of the problems which made the building undesirable to potential tenants including the water stain on the exposed beam. Blackburn requested that Intermountain place rent payments in an escrow account. Thomas indicated that he was not willing to put money in an escrow account and that Hewett should take care of the problems so that he could release the building. (TR. 259-261).

22. Intermountain's president, Dave Thomas, contacted attorney Robert A. Echard and caused a letter to be sent to

Hewett's attorney on March 22, 1994 explaining that Hewett's failure to make needed repairs made it impossible to sub-lease the building and that Intermountain no longer felt bound by the terms of the original lease agreement even though approximately two years remained. (Exhibit D26).

23. Hewett's attorney Timothy Blackburn responded in a letter dated March 28, 1994 and stated in paragraph 2 that he observed two small roof leaks in the occupied portion of the building and evidence of a roof leak in the overhang. (Exhibit D27, TR. 113).

24. Although Hewett received notification of the defects in the building and was aware that her attorney had observed the problems noted in his March 18, 1994 letter, Hewett did not have a roofer look at the roof and did not repair the roof because she did not see the roof leaking. (TR. 119).

25. Hewett was paying a mortgage on the property of $770 per month. (TR. 97). Hewett listed the property for lease with a real estate agent on April 27, 1994 for $900 per month but after four months on the market was unable rent the property for $900 per month because of the condition it was in. (TR. 22, 32). Hewett paid a $600 commission to the real estate agency to relet the building. (TR. 102).

26. James Hines desired to lease the building but because of the deteriorated condition of the building an estimated $15,000 would be required to remodel the building. (TR.59). Hines offered to lease the building for $600 per month taking into consideration that Hewett would not pay for any of the repairs. Hewett agreed to $700 per month with a $100 reduction in rent for the first two years of the lease to help cover costs of repairs. (TR. 64-66).

27. The property remained vacant from the time Intermountain moved out in February 1993 until August 31, 1994 when Hines began to lease the property. (TR. 60, 72). Hewett and Hines stated that they had not made any structural repairs to the building. (TR. 54-55, 84, 127).

28. Sharon Hoel, Gary Charlesworth and Dave Thomas testified that repairs had been made on the property prior to the trial. Sharon Hoel testified that the sag in the sheetrock of the overhang of the roof in the rear of the building had been partially repaired and that a retaining wall approximately 1 ft. high had been constructed between the drip line of the roof and the rear of the building. The wood panels at the rear of the building had been removed and repainted. (TR. 138-140). She also noted that a window seat had been built over the exterior

crack in the foundation to cover it. (TR. 147). Gary Charlesworth also observed a concrete block wall that had been constructed at the rear of the building between the drip line and the rear wall. (TR. 201). Dave Thomas testified that he observed a retaining wall that had been constructed at the rear of the building that appeared to have been constructed to keep the run off from the roof from running up against the back of the building and seeping underneath the floor into the building. (TR. 262-264).

29. Hewett brought suit against Intermountain asserting that Intermountain had breached the lease agreement by withholding lease payments and eventually sending notice to her terminating the lease agreement.

30. The trial concluded on November 15, 1994. The trial judge took the matter under advisement and rendered a decision on December 19, 1994. During the closing arguments on November 15, 1994, the trial court questioned Plaintiff's counsel extensively concerning problems with the building that had been established by the evidence. These included comments by the Court that the evidence demonstrated water on the floor, water drip lines, evidence of leaks, the Plaintiff observed evidence of a leak, the Plaintiff did not obtain a roofer to look at the building, the

Plaintiff obtained the premises in October, but did not have a roofer look at the problem, the Plaintiff was given notification of the problems of the building and made promises she would care for the problems, the Defendant made his rent payments however the Plaintiff did not repair the problem and did not send anyone out to examine the premises to determine the problem. (TR. 325-328, 332-333). The Court even made the comment that a tenant seeing water rings on the floors, drip off of the beams on the ceilings would be wary about leasing the premises and that there would be a duty on the part of the Plaintiff to repair the leaks because leaks do not cure themselves. (TR. 334-336). However, the Court in its ruling on December 19, 1994 made rulings which seemed to be inconsistent with the Court's comments during the course of the trial. (TR. of Court Ruling contained in the addendum hereto).

SUMMARY OF THE ARGUMENT

Hewett's Failure to Make Needed Repairs Which She Covenanted For in the Lease Agreement Substantially Impaired Intermountain's Ability to Relet the Property Constituting a Constructive Eviction.

A Lease is a Contract and Hewett Breached the Contract by

Failing to Make Repairs Thereby Relieving Intermountain of the Duty to Pay Rent for the Remainder of the Lease.

Should this Court Find Intermountain's Actions Constitute a Breach of the Lease Agreement, Hewett Did Not Act in a Commercially Reasonable Manner to Mitigate Damages.

ARGUMENT

POINT ONE

Hewett's Failure to Make Needed Repairs Which She Covenanted For in the Lease Agreement Substantially Impaired Intermountain's Ability to Relet the Property Constituting a Constructive Eviction.

Where a landlord makes a covenant to repair in a lease agreement and then fails to comply with that covenant resulting in the tenant's enjoyment of the property being impaired, the result is a constructive eviction. "Constructive eviction is a defense to a landlord's action for nonpayment of rent. . . In order to effectively assert the defense of constructive eviction, the tenant also must have provided the landlord with adequate notice of the alleged defects and allowed the landlord a reasonable amount of time to remedy the defects." Kenyon v. Regan, 826 P.2d 140,142 (Utah App. 1992)(awarding tenant rebate of rent paid after landlord failed to make needed repairs). A

" . . .breach of a landlord's covenant to repair may constitute constructive eviction." Brugger v. Fonoti, 645 P.2d 647, 648 (Utah 1982)(finding no constructive eviction as landlord remedied problems within reasonable time).

The Utah Supreme Court defines constructive eviction as

> " . . . any disturbance of the tenant's possession by the landlord, or someone acting under his authority, which renders the premises unfit for occupancy for the purposes for which they were demised . . . provided the tenant abandons the premises within a reasonable time. . . To constitute a constructive eviction, the interference . . . with the tenant's enjoyment of the demised premises must be of a substantial nature and so injurious as to deprive him of the beneficial enjoyment of a part or whole of the demised premises. . . failure to do some act or to adequately perform it, may render a building just as untenantable as affirmative interference. . . ."

Thirteenth & Washington Sts. Corp. v. Neslen, 254 P.2d 847; 123 Utah 70 (Utah 1953)(finding constructive eviction relieved tenants of duty to pay rent). The Court determined that a particular defect which the landlord fails to repair does not have to be sufficient, in and of itself, to constitute a constructive eviction. Instead, the Court found that if the defect in the property coupled with the other deficiencies complained of cause substantial impairment, it will constitute a constructive eviction. The Court stated:

> "It is not our problem to evaluate separately the conditions complained of. It may well be that various of them taken alone would not be of sufficient import

> to create a substantial impairment of the use and enjoyment of the premises. However, it is the cumulative effect of them all which must be considered."

Thirteenth & Washington, 123 Utah at 78.

In Thirteenth & Washington, the Defendants were a group of lawyers who vacated certain office space before their lease on it had run claiming a constructive eviction. The lease at issue contained express covenants for the landlord to maintain the building and allowed for the landlord to be the sole judge as to the sufficiency with which the covenants were complied with. The Defendants experienced numerous difficulties with the building including unsatisfactory restroom facilities, lack of enough heat, unlighted stairways, other businesses in the building which caused annoyances to the law offices, doors being locked by the landlord before the time the lease described, and elevator service being stopped too early in the day. The Defendants' repeated complaints concerning these problems were followed by promises from the landlord that the conditions would be improved. Defendants did not abandon the premises immediately, but waited to see if the promises would be fulfilled and when no action was taken by the landlord, Defendants vacated and withheld rent. The Court recognized that taking each of these problems separately,

none of them may be severe enough to interfere with Defendant's use of the building so as to constitute a constructive eviction. Instead the Court considered the cumulative effect of them all to find a substantial impairment of the use and enjoyment of the premises and found a constructive eviction justifying the defendants withholding rent and vacating the premises before the lease had expired.

The case at issue before this Court is very similar to Thirteenth & Washington. Intermountain entered into a lease agreement for certain commercial property. When Intermountain gave notice to Hewett of needed repairs which she had covenanted for under the lease, Hewett repeatedly promised to fix the defects but never did. Intermountain in turn withheld rent and eventually gave notice to Hewett that it was abandoning the property claiming constructive eviction.

To find a constructive eviction in this case: a) Hewett must have breached a duty covenanted for under the lease, b) This breach must have interfered with Intermountain's use and enjoyment of the property, c) Intermountain must have given notice and a reasonable opportunity to fix the problem, and then abandoned the property within a reasonable time. The evidence presented at the trial established all of these conditions.

Hewett and Intermountain entered into a contract for the lease of commercial property. Hewett expressly covenanted in the lease to maintain and repair certain parts of the property. These covenants to repair included the roof, outside walls, structure, and landscaping. The validity of the lease agreement and the covenants contained therein have not been challenged by either party and should be enforced as the parties contracted for.

After taking control of the property, Intermountain began to notice problems with the property which were the responsibility of Hewett under the lease agreement. A crack in the foundation, gaps between the building itself and the foundation, and poorly sealed window casings allowed water from the outside sprinkling system to continually leak into the building. Dust and dirt also blew in through these unsealed spaces making it difficult, if not impossible, to keep the interior of the building clean.

After vacating the property but before abandoning it, Intermountain became aware of numerous other problems beginning to develop. Evidence of a severe roof leak became apparent as the outside overhang of the building began to rot away. Water deposits became noticeable on the ceiling, walls, and floor of the building also evidencing a roof leak. (Exhibits P13, P19, P18-21). Although Intermountain thoroughly cleaned the building

upon moving out and several other times while it stood vacant, dirt and dust blowing in through the cracked foundation and poorly sealed window casings made it nearly impossible to keep the interior of the building clean.

As Intermountain tried to relet the building, prospective tenants showed concern about the problems and whose responsibility the repairs would be. The combination of the water damage, dirt which came in through the foundation and windows, and conditions left behind by Hewett herself when she removed her beauty salon equipment severely impaired Intermountain's ability to sublet the building. Just as the Supreme Court found in Thirteenth & Washington, it was not one defect alone which caused prospective tenants to shy away from leasing the building, but the cumulative effect of all of the problems substantially impaired Intermountain's use and enjoyment of the premises by preventing it from finding a new tenant.

The trial court found that these defects in the building were not the reason why Intermountain could not relet the property. This contradicts not only testimony at trial that prospective tenants did not want to lease the building because of the numerous defects, but also Exhibits which stated the same and

even the judge's own comments at trial that " . . .a tenant walking in there seeing rings on the floor, some drips off the beams on the ceiling, is going to naturally be a little wary about getting into a premises where there's a leak. " (TR. 334). It should be noted that the trial court made its comments during closing arguments heard on the 15th day of November, 1994. The trial judge did not render a decision until the 19th day of December, 1994. Since the trial court judge did not have a transcript of the comments he had made during the trial, the Judge may have forgotten his conclusions and concerns which had been stated at the time of the trial. The trial court made numerous comments indicating that evidence had been produce of problems in the building and that those problems could influence a tenant looking at the building. (TR.325-328, 332-366).

After making these statements, the trial court judge went on to find that the leaks were not visible unless one looked closely and that they were not the cause of Intermountain's inability to relet the property. Common sense dictates that a prospective tenant would do just that. A prospective tenant is not the same as a casual customer entering a building to do business or a real estate agent doing a "walk-through". A prospective tenant would surely examine a piece of property with great scrutiny and feel

concern over any visible problems as the trial court judge suggested during trial rather than casually glancing at it as the trial court suggests in its findings of fact.

The trial court also found that the dirty condition of the building was a deterrent to new tenants and implied that this problem was attributable solely to Intermountain. The court failed to recognize that undisputed testimony at trial showed that Intermountain had cleaned the building several times while it was vacant but that the poorly sealed foundation and window casings allowed dirt and dust to constantly blow into the building.

The trial court also found that Intermountain attempted to relet the property at $950 to $970 per month and implied that Intermountain was asking an unreasonable amount. The court failed to recognize that Intermountain paid $900 per month and testimony evidenced that the fair market valued of commercial property in the area had gone up since the time the lease was entered into. Uncontradicted testimony at trial showed Intermountain attempted to negotiate with prospective tenants by reducing the monthly rent to as low as $680 per month and was *still* unable to relet the property. In the end, even Hewett herself could not relet the property for any more than $600 per

month. One must wonder just how much money Intermountain would have to lose each month by accepting a lower rent from a subtenant before the trial court would find a "substantial impairment."

In addition to the leaking roof and foundation and the dirt blowing in from the outside, by no fault of Intermountain's, Hewett left many items in the building in disrepair when she took out the beauty salon equipment prior to Intermountain occupying the building. Hewett's actions left holes in the counters where sinks had been, exposed plumbing and electrical wiring, and floors scratched and marked.

In viewing the dilapidated condition of the property, most of the defects were the responsibility of Hewett. Her failure to repair these defects made it impossible for Intermountain to relet the property even though it attempted to mitigate damages by accepting a lower monthly rent than it was paying to Hewett. This Court should take all of these defects combined into consideration and find that Intermountain's ability to sublet the property was substantially impaired by Hewett's failure to make repairs contracted for in the lease.

Just like the Defendants in Thirteenth & Washington, Intermountain sent several written notices of the needed repairs

to Hewett, who in turn promised to make the repairs but never did. Unfortunately, the trial court in the case at issue made a serious error in finding that Intermountain did not observe the problems nor notify Hewett of the problems needing attention prior to vacating the property.

First, testimony at the trial showed that Intermountain did verbally notify Hewett several times of the problem with the sprinklers causing water to leak inside the building prior to vacating the building. Mr. Thomas stated, "Water came in the front of the building and I told her, I called her and told her." (TR. 252). Hewett produced no testimony to contradict this notice but the trial court none-the-less found notice had *not* been given prior to vacating.

Second, the trial court failed to recognize the tremendous distinction between "vacating the property", and "abandoning the property." Although Intermountain "vacated" the property in March 1993, it did not "abandon" it at that time. Rather it continued to pay rent, had keys in its possession, attempted to sublet the property, and cleaned the interior of the building on several occasions in an attempt to find a new tenant.

After vacating but prior to abandoning the property, Intermountain observed several other problems needing repair.

Thomas gave extensive testimony at trial and produced several exhibits evidencing his observation of the roof, foundation, and windows leaking and *still* the trial court found that "[b]y the defendant's own evidence, the water problems and the other problems identified were never observed or mentioned." If the trail court intended this finding to apply only to the time prior to vacating the building, it is irrelevant. In finding a constructive eviction, what is relevant is that Intermountain noticed the problems and took action prior to abandoning the property. Alternatively, if the judge meant this to mean Intermountain had not observed the problems at *any* time, he has simply ignored pages and pages of testimony and numerous exhibits showing written identification of the problems and notification to Hewett.

It is also clear from the evidence that Intermountain allowed a commercially reasonable time to make the repairs. Written notice of needed repairs was sent to Hewett in October and Intermountain did not abandon the property until January. The trial court judge even made the comment that "a prudent action on her part is to go in now and remedy the leak in October so that you don't have a serious problem in the winter months."

(TR. 327). The repairs were needed, roof leaks do not fix themselves, Intermountain gave Hewett repeated notice which Hewett recognized by saying she would make the repairs when rent was paid. However, Hewett did not make any repairs to the building.

After months of attempting to sublet the property and trying to get Hewett to make needed repairs to the building, Intermountain caused its attorney to send a letter to Hewett stating that her failure to make needed repairs was not only a breach of her covenant to repair but also prevented Intermountain from subletting the property. After approximately nine months of unsuccessfully trying to relet the property, Intermountain abandoned the property by giving its only key to the building back to Hewett and sending written notice that it would no longer pay rent and considered the lease terminated.

This Court should find as a matter of law that Hewett's failure to make repairs which were her responsibility under the lease agreement combined with Intermountain's abandoning the property constitute a constructive eviction, thereby relieving Intermountain of the duty to pay rent.

POINT TWO

A Lease is a Contract and Hewett Breached the Contract by Failing to Make Repairs Thereby Relieving Intermountain of the Duty to Pay Rent for the Remainder of the Lease.

The lease agreement between Intermountain and Hewett is a contract and a breach of the covenants contained therein should be governed by commercial law principles. "The relation of landlord and tenant is created by contract, either express or implied. . . A lease is both an executory contract and a present conveyance. It creates a privity of contract and a privity of estate." 49 Am.Jur. 2d §1.

In Reid v. Mutual of Omaha Ins. Co., 776 P.2d 896 (Utah 1989), the Utah Supreme Court recognized that " . . .leases are generally viewed as commercial transactions in which the landlord retains the estate but permits its use by another on specified conditions. . . .". (P. 905). The Court further explained:

> It suffices to say that modern landlord-tenant relationships, while steeped in the tradition of ancient property law, have taken on substantive characteristics so similar to commercial transactions that certain of the legal principles developed in the law of contracts in the context of commercial transactions are now appropriately applied to leases, regardless of whether use is made of labels derived from the law of property conveyance or of contract.

(P. 902).

The term "lease" is commonly used as including something

more than the mere legal act by which a tenancy is created, and embraces what are described as the "covenants of the lease." 49 Am.Jur. 2d §1. A landlord may therefore covenant to make repairs of the leased property. The Utah Supreme Court has held that " . . .parties are free to contract according to their desires in whatever terms they can agree upon; and further, that the contract should be enforced according to its terms, unless that result is so unconscionable that a court of equity will refuse to enforce it." Russell v. Park City Utah Corporation, 548 P.2d 889, 891 (Utah 1976); Jacobson v. Swan, 278 P.2d 294 (Utah 1954); Perkins v. Spencer, 243 P.2d 446 (Utah 1952).

Just as the Court found the provisions in the Russell lease to be binding on the parties as contractual obligations, " . . . an agreement by the landlord to repair is valid and where there is such an agreement, the landlord is obligated to the tenant to make repairs." 49 Am.Jur. 2d §828. There is a breach of the landlord's obligations if:

> . . . after the tenant's entry and without fault of the tenant, a change in the condition of the leased property caused by the landlord's conduct or failure to fulfill an obligation to repair . . . makes the leased property unsuitable for the use contemplated by the parties and the landlord does not correct the situation within a reasonable time after being requested by the tenant to do so. Restatement of Property, 2d §5.4

Obligations on the part of tenant also arise under a lease agreement. In a lease agreement, the tenant covenants to pay the landlord rent for the use of his property. Although under traditional property law, a lessee's covenant to pay rent was viewed as independent of any covenants on the part of the landlord, the Utah Supreme Court advocates the modern view of leases as commercial transactions and " . . . the tenant's obligation to pay rent is conditioned upon the landlord's fulfilling his part of the bargain . . . Once the landlord has breached his duty . . . there are at least two ways the tenant can treat the duty to pay rent. The tenant may continue to pay rent to the landlord or withhold the rent." Additionally, the court recognized that if a tenant continues to pay rent after the time of the landlord's breach, the tenant can bring an affirmative action to establish the breach and receive a reimbursement for excess rents paid. Wade v. Jobe, 818 P.2d 1006, 1011 (Utah 1991).

In the instant case the trial court found that the parties entered into a valid lease agreement on January 21, 1991. In the lease agreement the obligation for maintenance of the property is delegated to the parties. It is clear and unambiguous that Hewett took on the obligation to care for and maintain the roof,

outside walls, landscaping, and structure of the building itself. The express covenants in the lease agreement create contractual obligations and should be enforced against the parties.

The facts of this case show that by no fault of Intermountain's, the foundation of the building was cracked and poorly sealed allowing water and dirt to enter the building. Intermountain first noticed this problem at the time Hewett had a sprinkling system installed outside of the building and the leaking continued throughout the time Intermountain occupied the building. Intermountain notified Hewett of the leaking foundation several times throughout the lease period, but Hewett took no measures to remedy the problem.

Additionally, extensive evidence of water damage to the interior and the exterior of the building was presented at trial. Water stains on the ceiling and floors and a rotting overhang evidenced a roof leak of undetermined origin. Although Intermountain did not learn of the leaking roof until after it had voluntarily moved its business out of the building, once aware of these problems it notified Hewett of the needed repairs. Hewett's receipt of this notice is evidenced by the repeated letters from Hewett and her attorney promising Intermountain that the needed repairs would be made when the rent was brought

current. Intermountain complied with Hewett's request bringing rent current but still no measures were taken by Hewett to repair the leaking foundation and roof. The trial court judge even noted at trial that Hewett made repeated promises to Intermountain which she never fulfilled. (TR. 332-333). Hewett simply never fulfilled her end of the bargain.

This Court should enforce the lease agreement according to its terms holding Hewett liable for needed repairs which included the leaking foundation, leaking roof, and poorly sealed window casings. In reviewing the evidence it is clear that Hewett breached her express covenant to maintain and repair the outside and structure of the building and Intermountain's duty to pay rent is dependant on Hewett's fulfilling her obligations under the lease agreement. Hewett's breach of her covenant to repair relieves Intermountain of its duty to pay rent.

POINT THREE

Should this Court Find Intermountain's Actions Constitute a Breach of the Lease Agreement, Hewett Did Not Act in a Commercially Reasonable Manner to Mitigate Damages.

Utah case law compares the assessment of damages in a breach of a lease to assessing damages in a tort or contract case. The

Utah Supreme Court used this analysis to find that a landlord is required to take steps to mitigate its losses in the event a tenant abandons a property. The Court stated, " . . . allowing a landlord to leave property idle when it could be profitably leased and force an absent tenant to pay rent for that idled property permits the landlord to recover more damages than it may reasonably require to be compensated for the tenant breach." The Court required that a landlord take positive steps reasonably calculated to effect a reletting of the premises. The landlord is the one in the best position to ensure that serious efforts are made to redeploy the rental property in a productive fashion. Whether a landlord takes reasonable measures to mitigate is determined by the standard of objective commercial reasonableness. The Court stated, "A landlord is obligated to take such steps as would be expected of a reasonable landlord letting out similar property in the same market conditions. . . [T]he objective commercial reasonableness of mitigation efforts is a fact question that depends heavily on the particularities of the property and the relevant market at the pertinent point in time." Reid v. Mutual of Omaha, 776 P.2d 896, 906. (UT. 1989).

The trial court in the instant case erred in determining that Hewett had acted in a commercially reasonable manner in

attempting to mitigate damages. Although Hewett did hire a real-estate agent to show the property, the Court in Reid held that Hewett 's duty to mitigate required more than being " . . . passively receptive to opportunities to relet the premises . . . it is not uncommon for property, particularly commercial property, to be modified to meet the needs of a new tenant." In Reid, the Court found the landlord had fulfilled its duty to take objectively commercially reasonable efforts to mitigate by completely remodeling the building to meet the needs of a new tenant. Hewett however, did nothing to make the property more attractive or accommodating to potential tenants. She simply continued to lower the amount of rent she was asking for the property until someone was willing to accept the property. Had she taken more affirmative mitigation efforts and repaired the building as requested by Intermountain, Hewett could certainly have leased the building for at lease the amount of the original lease agreement and perhaps even more as the real-estate agent testified that market value of commercial property had gone up in the area.

It is also ironic that when Hewett released the property for $700 per month, she allowed a $100 per month "discount" in the lease to the new tenant for a period of time which coincides

exactly with the amount of time left in the lease with Intermountain. The result of this is that the new tenant pays $600 per month for the time remaining on Intermountain's lease, and as soon as it expires, the new tenant begins to pay $700. This increases damages attributable to Intermountain for the remainder of the lease increase by $100 a month. The trial court found that Hewett's inaction was reasonable despite express covenants to repair in the lease agreement itself and promises by Hewett and her attorney to make repairs. The trial court mistakenly concluded that since Hewett did not actually witnessed water on the ceiling and floor, she was not obligated to make any repairs.

Although in glancing across a snow covered field, often times we see only the tracks left behind by the animal, common sense and logic tell us that the creature exists and is lurking somewhere nearby. It defies logic to believe that despite the extensive tracks left behind by the leaking roof and foundation, that the animal has mysteriously disappeared. It is surely not reasonable to assume that because Hewett did not actually see the water dripping from the ceiling or running the through the foundation, that a leak did not exist. It is also unreasonable to envision a roof leaking so badly as to cause the eaves or

overhang of a building to rot and to leave behind stains on ceilings, walls, and floors and then mysteriously fixing itself.

The trial court judge commented at trial that Hewett had noticed the leak and if there's been a leak there once before, there probably will be a leak there again. (TR. 336). He also commented that ". . . if there's and old leak, they don't cure themselves do they?" (TR. 335-336). And finally, the judge questioned why Hewett had repeatedly promised to make the repairs to the roof when the rent was paid, and then repeatedly breached that promise. (TR. 332).

While it may be true that Hewett may not have extensive experience in leasing commercial property, the standard by which her action or inaction in making the property attractive to a new tenant in order to release it is not what is reasonable to Hewett herself. Hewett's own knowledge concerning what repairs were needed and her financial ability to make such repairs is irrelevant. What matters is whether a reasonable landlord letting out a similar property in the same market conditions would have left the building with all of its visible defects and expect a prospective tenant to find the property attractive enough to occupy it at the fair market value.

It is extremely difficult to examine the evidence presented

at trial of the needed repairs and deteriorating condition of the property and consider Hewett's inaction to be objectively commercially reasonable. This Court should find that Hewett did not act in a commercially reasonable manner to mitigate damages and therefore did not meet the required burden of proof set forth in Reid to make Intermountain liable for unpaid rents.

CONCLUSION

Hewett entered into a lease agreement with Intermountain which required Hewett to maintain the roof, the exterior walls, structural repairs and other parts of the building. The building developed significant roof problems resulting in water stains along the interior exposed beam and extensive damage to the sheetrock and other portions of the overhang of the roof at the rear of the building. The building had structural defects which allowed dust and water to come in around the foundation causing stains and other damage to the floor. Hewett was properly notified that the property could not be released by Intermountain until these problems were remedied. She and her attorney promised that the repairs would be made if Intermountain brought it payments current. However, after Intermountain brought its payments current, Hewett refused to make the repairs and later

insisted that additional rents be placed in escrow before the repairs would be made. Because of Hewett's failure to make the repairs, Intermountain was not able to release the property at a reasonable price and notified Hewett that if the repairs were not made Intermountain would abandon the property and seek to be relieved from its obligation to pay the lease payments.

Hewett's failure to fulfill the terms of the lease and to repair the property constituted a constructive eviction and a breach of contract thereby relieving Intermountain from its obligation to pay rent on the leased property. In addition, Hewett failed to mitigate her damages by failing to repair the property and reletting it a repaired condition.

Intermountain respectfully requests that the Court reverse the decision of the trial court and find that Intermountain was relieved from its obligation to pay rent because of the breaches on the part of Hewett.

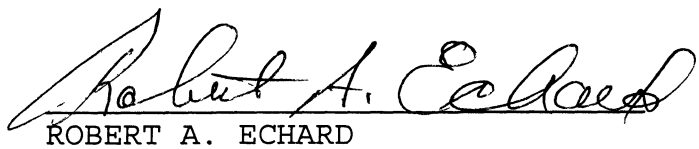
RESPECTFULLY SUBMITTED THIS 20 DAY OF JULY, 1995.

Robert A. Echard

ROBERT A. ECHARD
Attorney for Defendant/Appellant

CERTIFICATE OF MAILING

I hereby certify four (4) true and correct copies of the foregoing Brief of Appellant were mailed, postage prepaid, this 13 day of July, 1995 to Timothy W. Blackburn, Attorney for Plaintiff/Appellee, at 2404 Washington Blvd., #900, Ogden, Utah 84401.



ROBERT A. ECHARD
Attorney for Defendant/Appellant

ADDENDUM

PLAINTIFF'S EXHIBIT
EXHIBIT NO. 1
CASE NO 940900197
DATE REC'D IN EVIDENCE 11/14/94
CLERK MEHM

LEASE

Sherrie Hewett

of 3772 Washington Blvd, County of Weber, State of Utah, hereinafter referred to as landlord, hereby remise, release and let to D & S Corp DBA Intermountain Printing/Type Tech of 825 - 25th Street, County of Weber, State of Utah, hereinafter referred to as tenant, all those premises situate, lying and being in the 3772 Washington Blvd of Ogden, County of Weber and State of Utah, commonly known as New Generation Beauty Parlor and more particularly described as follows, to wit: 05-130-0007

Note: Storm sewer must be installed as requirrd by South Ogden City. Lessee must accept the inconvenience of approx. 2 weeks. All asphalt will be restored and stripping replaced.

(Legal Description)

TO HAVE AND TO HOLD the said premises, together with the appurtenances, unto the tenant, from the 11th day of February A.D. 1991, for and during and until the 11th day of February A.D. 1996, a term of 5 years.

And tenant covenants and agrees to pay to landlord as rental for said premises, the sum of $10,800 per year Dollars, payable as follows: $900.00 per month

And tenant further agrees to deliver up said premises to landlord at the expiration of said term in as good order and condition as when the same were entered upon by tenant, reasonable use and wear thereof and damage by the elements excepted, and the tenant will not let or underlet said premises, or any part thereof without the written consent of landlord first had and obtained, which consent will not be unreasonably withheld.

And tenant further covenants and agrees that if said rent above reserved or any part thereof shall be unpaid for 15 days days after the same shall become due; or if default in any of the covenants herein contained to be kept by tenant is not cured within 30 days from written notice, or if tenant shall vacate such premises, landlord may elect, without notice or legal process, to re-enter and take possession of said premises and every and any part thereof and re-let the same and apply the net proceeds so received upon the amount due or to become due under this lease, and tenant agrees to pay any deficiency.

Responsibility for the maintenance shall be as indicated: Tenant responsible for (T), Landlord responsible for (L).

Roof L, Exterior Walls L, Interior Walls T, Structural Repair L, Interior Decorating T, Exterior Painting L, Yard Surfacing L, Plumbing Equipment L, Heating and Air Conditioning Equipment L, Electrical Equipment L, Light Globes and Tubes T, Glass Breakage T, Trash Removal T, Snow Removal T-L, Janitor T, Others Landlord to remove swivel chairs and yellow sinks and glass counter in front. Leave small white sink, cainbets except where sinks are removed. Leave three freestand chairs (grey) in front area

Responsibility for utilities, taxes and insurance shall be as indicated: Tenant responsible for (T), Landlord responsible for (L).

Power T, Heat T, Water T, Sewer T, Telephone T, Real Property tax L, Increase above 19 ... In Real Property Tax L, Personal Property Tax T, Fire Insurance on Building L, Fire Insurance on Personal Property T, Glass Insurance L, Other

Each party shall be responsible for losses resulting from negligence or misconduct of himself, his employees or invitees.

Furniture, fixtures and personal property of tenant may not be removed from the premises until rent and other charges are fully paid.

In case of failure to faithfully perform the terms and covenants herein set forth, the defaulting party shall pay all costs, expenses, and reasonable attorneys fees resulting from the enforcement of this agreement or any right arising out of such breach.

Tenant will provide parking stall on south side of parking lot and will share snow removal cost with Landlord. Each month Lessee will provide snow removal bill and deduct 1/2 from rent. Tenant will pay $900.00 upon landlords signing Lease which is the last month rent and first month will be payed on day of occupancy. Lessee will have use of sign and will change the sign for his business needs.

Witness the hands and seals of said landlord ..... and said tenant ..... at .....

this 25th day of June A.D. 1991.

Signed in presence of

..... (Seal)

Sherrie E. Hewett (Seal)

..... (Seal)

CORPORATION

SHEREE

I HAD SOME PEOPLE INTERESTED IN LEASING THE BOILDING BUT WOULD NOT BECAUSE OF THE FOLLOWING REASONS

1) ROOF LEAKS & OVERHANG LEAKS — SOURCE

2) FLOOR TILES UP — TENANT

FRONT WATER DAMAGE — SOURCE

3) DRYER VENTS

PLAINTIFF'S EXHIBIT
EXHIBIT NO. 2
CASE NO. 940900191
DATE REC'D IN EVIDENCE 11/4/94
CLERK MHM

Document Systems Corporation
Intermountain Printing / TypeTech
Corporate Offices: 825 25th Street, Ogden, Utah 84401
Phone 801-394-4161 Fax 801-393-0640

Printed on: Wausau Recycled Royal Fiber/Blue - 70 lb Text 10/91

4) PAINTING (tenant)

5) COOLING SYSTEM done
UNIT FULL OF DIRT

6) FOUNDATION CRACKED

7) WINDOWS CRACKED tenant

PLEASE SEE TO IT
THESE ITEMS ARE
FIXED IMMEDIATELY

THANK
YOU

Dave

Please be advised of this fact
that I do not intend to do any
repairs of any nature until sa
time as rent for Aug & Sept ar
brought current. Furthermore plea
refer to the signed lease agreem
Peter Fey will tell you that spells out the
responsibilities of both tenant & landlord

Gar-1 Charles Wilson
544-4663

CORPORATION

Sheree Hewett
748 Maple Street
Ogden, Utah 84403

September 14, 1993

Dear Sheree,

I am having trouble leasing the building because of some problems with it that need your immediate attention.

The roof and overhang leak and the front windows leak, therefore the tiles have started to warp. The building needs to be painted inside and out and the cooling system does not work. It is full of sand, the foundation is cracked and a window is broken.

I have had many people inquire about the building but all have said that it is in too bad of shape.

I will not continue to pay rent if these items are not fixed. Call me if you have any questions.

Thank you,

Dave C. Thomas
President

Intermountain Printing / TypeTech
Document Systems Corporation
Corporate Offices: 825 25th Street Ogden, Utah 84401
Phone 801-394-4162 Fax 801-393-0640
South Ogden: 3772 Washington Boulevard Ogden, Utah 84405
Phone 801-399-0067 Fax 801-399-0068

楓林小筑

MIRAMAR-INC.

MAPLE GARDENS RESTAURANT

4030 Riverdale Rd.
Ogden, Utah 84405
801-621-1004

PLAINTIFF'S EXHIBIT
EXHIBIT NO. 4
CASE NO. 940900691
DATE REC'D IN EVIDENCE 11/14/94
CLERK

Sept 15 1993

Dave,

Let this letter serve as constructive notice regarding the note I received from you on Sept 4 1993.

Please be apprised of this fact that I do not intend to pay any repairs to the property at 3772 Washington Blvd until such time as the rents for both August and September '93 are brought current.

To date the Amount that is due totals $1,890.00 that's $900 per month plus 5% late fee of $45 x two.

Furthermore, please refer to your lease agreement dated Feb 11 1991 that spells out the responsibilities of both tenant and landlord. Several items on your list, are to be maintained by the tenant and not the landlord

Sincerely,

Sheree E Hewett

P.S. Upon receipt of monies owning then and only then will I consider doing the necessary repairs

PLAINTIFF'S EXHIBIT
EXHIBIT NO. 5
CASE NO. 940400A1
DATE REC'D IN EVIDENCE 11/14/94
CLERK

楓林小筑

MIRAMAR-INC.

MAPLE GARDENS RESTAURANT

~~4030 Riverdale Rd.~~
Ogden, Utah 84405
801-621-1004

October 5 1993

Dave,

I am appreciative of your correspondence and check approximately a week ago however there are a number of issues unaddressed.

First of all, there is the matter of $990.00 which is accrued which has not been paid as of this date. I fully expect that amount be brought current so as to address some of the issues brought up in your letter The fact that you are in arrears of your rent has made it necessary for me to utilize my own personal funds to service my existing mortgage. I dont want to appear as being "stubborn" or "uncooperative" in assisting you to sublet (lease) the building on Washington Blvd but you have put me in a financial bind by not paying your rent (and late fees $90) on time. Lets work to resolve this matter so you can get your tenant moved in and happy and I can have the rent brought current to facilitate the repairs that I am

楓林花苑

MIRAMAR-INC.

MAPLE GARDENS RESTAURANT

~~1980 Riverdale Rd~~
Ogden. Utah 84405
801-621-1004

Responsible for in the lease.

Sincerely,

Sheree L Hewett

P.S Please sent me a key to my building, I want to see what Damage is done to my building.

thanks

6

PLAINTIFF'S EXHIBIT
EXHIBIT NO. 6
CASE NO. 940900191
DATE REC'D IN EVIDENCE 11/14/94
CLERK MHM

LAW OFFICES OF
VAN COTT, BAGLEY, CORNWALL & McCARTHY
A PROFESSIONAL CORPORATION
SUITE 1600
50 SOUTH MAIN STREET
SALT LAKE CITY, UTAH 84144
TELEPHONE (801) 532-3333
TELEX 453149

TIMOTHY W. BLACKBURN

OGDEN OFFICE
SUITE 900
2404 WASHINGTON BOULEVARD
OGDEN, UTAH 84401
(801) 394-5783

PLEASE REPLY TO
OGDEN OFFICE

November 5, 1993

Mr. Dave C. Thomas
Document Systems Corporation
825 25th Street
Ogden, UT 84401

Dear Mr. Thomas:

I represent Sheree Hewett. D&S Corp. doing business as Intermountain Printing/Type Tech, is in default of the lease dated June 28, 1991, whereby it leased the property at 3772 Washington Boulevard.

D&S Corp. has failed to make the September, October and November payments. The amount due for rent is $2,700.00.

Because you are in default, you owe my client's attorney fees which are $120.00.

The lease provides that you pay one-half of the snow removal. My client has paid the total fee and is willing to waive your one-half if you pay the delinquency within ten (10) days.

I have reviewed your letters sent to my client. Section 57-22-5 Utah Code Annot. does not allow you to withhold rent if the items you requested are not resolved.

My client will immediately repair the items for which she has responsibility under the lease upon your payment of the rent. The lease spells out specifically each parties responsibility to maintain an item.

Any damage that is due to tenant's neglect is the responsibility of the tenant to repair.

Request is made that you allow my client access to the premises so that she may inspect the premises to determine what repairs need to be completed.

907\4983.

If the rent is not brought current within the time stated above, she intends to file suit for the rent, attorney fees, snow removal fees, late fees and court costs.

Sincerely,

Timothy W. Blackburn

TWB/dh
cc: Sheree Hewett

7

PLAINTIFF'S EXHIBIT
EXHIBIT NO. 7
CASE NO. 940900191
DATE REC'D IN EVIDENCE 11/14/94
CLERK MHM

LAW OFFICES OF
VAN COTT, BAGLEY, CORNWALL & McCARTHY
A PROFESSIONAL CORPORATION
SUITE 1600
50 SOUTH MAIN STREET
SALT LAKE CITY, UTAH 84144
TELEPHONE (801) 532-3333
TELEX 453149

TIMOTHY W. BLACKBURN

OGDEN OFFICE
SUITE 900
2404 WASHINGTON BOULEVARD
OGDEN, UTAH 84401
(801) 394-5783

PLEASE REPLY TO
OGDEN OFFICE

November 30, 1993

Mr. Dave C. Thomas
Document Systems Corporation
825 25th Street
Ogden, UT 84401

Dear Mr. Thomas:

I represent Sheree Hewett. D & S Corporation, doing business as Intermountain Printing/Type Tech, is in default of the lease dated June 28, 1991, whereby it leased the property at 3772 Washington Boulevard. D & S Corporation has failed to make the November payment. The amount due is $900.00. The lease provides for attorney's fees and attorney fees now have accrued to $180.00.

You failed to pay one half of the snow removal payments when you paid the September and October rent. My client is still willing to waive one half the snow removal if you pay the delinquent November rent plus my client's attorney fees within ten days from the date of this letter.

My client will immediately repair the items for which she has responsibility under the lease upon your payment of the rent. The lease spells out specifically each party's responsibility to maintain an item. Any damage that is due to your neglect is your responsibility to repair.

Sincerely,

Timothy W. Blackburn

TWB/dh
cc: Sheree Hewett

907\1752.

LAW OFFICES OF
VAN COTT, BAGLEY, CORNWALL & McCARTHY
A PROFESSIONAL CORPORATION
SUITE 1600
50 SOUTH MAIN STREET
SALT LAKE CITY, UTAH 84144
TELEPHONE (801) 532-3333
TELEX 453149

TIMOTHY W. BLACKBURN

OGDEN OFFICE
SUITE 900
2404 WASHINGTON BOULEVARD
OGDEN, UTAH 84401
(801) 394-5783

PLEASE REPLY TO
OGDEN OFFICE

[redacted]

March 28, 1994

Mr. Robert A. Echard
Attorney at Law
2491 Washington Boulevard Suite 200
Ogden, UT 84401

Dear Bob:

I inspected the property with Dave Thomas, Mr. Charlesworth, his real estate agent, and another real estate agent.

The only thing that I observed that is my client's responsibility was evidence of two small roof leaks in the occupied portion of the building, and evidence of a roof leak in the overhang.

I inspected the property on March 24, 1994, with Sheree to see if there was any evidence that those areas were leaking after the rain and snow of March 21 and 22. There was no evidence that the roof was leaking. If there is a roof leak, it is minor. It does not prevent Mr. Thomas from leasing the property. If the roof leaks, my client will repair it.

In my opinion, the biggest problem preventing Mr. Thomas from renting is the building is extremely dirty, light covers are broken, cabinets are damaged, glass in a cabinet is broken and electrical wires are exposed. No one has occupied this building for years. A good cleaning would go a long way to help him lease the building.

To settle this matter, my client will accept $500.00 a month beginning January 1994, with the last payment February 1996. My client will take possession of the property and your client would not have any further possession. My client is free to use the property as she desires. My client will waive the snow removal costs and her attorney fees.

Also accepted to my client is that your client make up the back rent beginning January 1994, pay my attorney fees and continue possession of the building and paying rent. If, in fact, the roof

leaks, my client will fix it. As soon as any leak appears, notify my client and she will have someone fix it. It is difficult to repair a leak when there is no leak.

In my opinion, the leaks are certainly not material and the court will not terminate the lease based upon old evidence of two small leaks.

In addition, your client did not bring the payments current because he did not pay the attorney fees demanded.

These offers to settle expires March 31, 1994, at 5:00 p.m.

Sincerely,

Timothy W. Blackburn

TWB/dh
cc: Sheree Hewett

907\4983.

Here's The Fax

TO: Dave

OFFICE:

FROM: Sharon Hoel

DATE: Aug 31

REASON:

PAGES (including cover page): 02

IF YOU DID NOT RECEIVE THE COMPLETE TRANSMISSION,
PLEASE CALL THE NUMBER BELOW:

The Company That Has Revolutionized Real Estate Marketing

Wardley corporation Better Homes and Gardens®

LAYTON HILLS MALL OFFICE
2071 Layton Hills Mall
Layton, Utah 84041
(801) 544-HOME (4663) FAX: (801) 546-5258

DAVE

FYI

leaks roof & overhang.
floor tiles
dryer vent
paint
counter tops
cooling system unit full of dirt
light fixture over sink
replace light fixture
dirt inside
handicap Bathroom
foundation cracked
floor drain
window cracked.
overhang rotting

Built before date present need

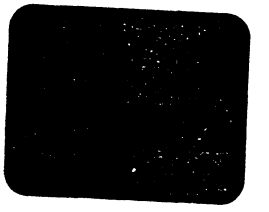
had a person wanted but no good to much wrong

Its a no go

LAW OFFICES
ROBERT ECHARD & ASSOCIATES
KEY BANK BUILDING, SUITE 200
2491 WASHINGTON BOULEVARD
OGDEN, UTAH 84401
PHONE: (801) 393-2300
FAX: (801) 393-2340

ROBERT A. ECHARD
JOHN H. GEILMANN

OF COUNSEL:
CRAIG D. STOREY



March 22, 1994

Mr. Timothy Blackburn
Suite 900
2404 Washington Blvd
Ogden, Utah 84401

Re: Documents Systems Corporation Lease
3773 Washington Blvd, Ogden, Utah 84403

Dear Tim:

As you probably know I represent Dave Thomas. He has contacted me recently concerning a lease he has with your client, Sheree Hewett. My client leased property from yours in 1991. In approximately September, 1993 my client complained to yours about the fact that the building was in a poor state of repair, and need to be brought to a good condition of repair so that he could re-lease the property. When your client did not respond, he withheld the rent payments.

In a letter from you dated November 5, 1993 you stated ..."my client will immediately repair the items for which she has responsibility under the lease upon your payment of the rent. The lease spells out specifically each parties responsibility to maintain an item."

My client brought the payments current, however, your client failed to repair the property, as required by the lease and as agreed to in your November 5, 1993 letter.

I am hereby notifying you that my client considers that failure a breach of the lease terms, and consequently no longer feels bound by the terms of the lease. He has not been paying lease payments since January, 1994 and will not pay any future lease payments on this property.

91-020

I am sure the Court will have not difficulty in understanding that the property is not of any value to my client, as long as the lessor refuses to honor the lease terms and provide a building that is capable of being re-leased by my client. My client has attempted to re-lease the property and reduce the amount of the lease payments. However, no one has been willing to consider the property because the condition it is in.

Sincerely,

ROBERT ECHARD & ASSOCIATES

Robert A. Echard

Robert A. Echard
Attorney at Law

RAE/LER

cc: Dave Thomas

92-159

IN THE DISTRICT COURT OF WEBER COUNTY

STATE OF UTAH

*****

SHEREE HEWETT,	)	
	)	
PLAINTIFF,	)	
	)	
VS.	)	COURT RULING
	)	
D & S CORPORATION,	)	CASE NO. 940900191
	)	
DEFENDANT.	)	

*****

BE IT REMEMBERED THAT THIS MATTER CAME ON REGULARLY FOR HEARING BEFORE THE HONORABLE MICHAEL D. LYON, JUDGE, SITTING AT OGDEN, UTAH ON THE 19TH DAY OF DECEMBER 1994.

WHEREUPON THE FOLLOWING PROCEEDINGS WERE HAD, TO WIT:

*****

APPEARANCES:

FOR THE PLAINTIFF: TIMOTHY W. BLACKBURN

FOR THE DEFENDANT: ROBERT A. ECHARD

*****

REPORTED BY DEAN OLSEN, CSR
847 E. 2800 N.
NORTH OGDEN, UTAH 84414
OFS. 399-8405, HM. 782-3146

92-159

OGDEN, UTAH DECEMBER 19, 1994 3:45 P.M.

THE COURT: GOOD AFTERNOON GENTLEMEN. GOOD. LET ME PUT YOU ON THE SPEAKER PHONE SO THAT MY COURT REPORTER CAN HEAR YOU. THE RECORD MAY SHOW THAT THIS IS THE TIME SET FOR A HEARING IN THE MATTER OF HEWETT VERSUS D & S CORPORATION. RECORD MAY ALSO SHOW THAT TIMOTHY BLACKBURN, WHO REPRESENTS THE PLAINTIFF, IS ON THE TELEPHONE. YOU'RE THERE, MR. BLACKBURN.

MR. BLACKBURN: YES.

THE COURT: AND ROBERT ECHARD, WHO IS REPRESENTING THE DEFENDANT, IS ALSO ON THE TELEPHONE. ARE YOU THERE, MR. ECHARD.

MR. ECHARD: YES, YOUR HONOR.

THE COURT: VERY GOOD. THIS IS A RATHER CRUDE OUTLINE THAT I HAVE. I'LL TRY TO GIVE THIS DECISION TO YOU WITH SOME MODICUM OF ORGANIZATION AND IF I DON'T MAKE MYSELF CLEAR, DON'T HESITATE TO INTERRUPT ME. HOPEFULLY, BY THE TIME I FINISH, YOU'LL UNDERSTAND WHAT I'M ATTEMPTING TO DO.

COURT FINDS AND RULES AS FOLLOWS: THAT THE PLAINTIFF LEASED THE PROPERTY OF 3772 WASHINGTON BOULEVARD TO THE DEFENDANT CORPORATION UNDER A LEASE AGREEMENT DATED JANUARY 21, 1991. UNDER THE LEASE AGREEMENT, DEFENDANT AGREED TO PAY THE PLAINTIFF ANNUAL RENT OF $10,800 A YEAR AT AN ANNUAL MONTHLY RENT OF $900 COMMENCING FEBRUARY 11, 1991, FOR A TERM OF FIVE YEARS. IN MARCH OF 1993, THE DEFENDANT VOLUNTARILY

VACATED THE PREMISES FOR BUSINESS REASONS. PRIOR TO VACATING, THE DEFENDANT NEVER COMPLAINED TO THE PLAINTIFF ABOUT ANY OF THE COMPLAINTS AND PARTICULARLY THE WATER DAMAGE THAT ARE THE SUBJECT OF THIS LAWSUIT. BY DEFENDANT'S OWN EVIDENCE, THE WATER PROBLEMS AND THE OTHER PROBLEMS IDENTIFIED WERE NEVER OBSERVED OR MENTIONED, EXCEPT THE PROBLEM WITH THE SPRINKLER SYSTEM AND ITS OCCASIONAL LEAKING INTO THE PREMISES.

TWO WEEKS AFTER VACATING, THE DEFENDANT ENGAGED A REALTOR WHO SHOWED THE PROPERTY TO PROSPECTIVE TENANTS DURING A PERIOD OF EARLY SUMMER THROUGH NOVEMBER OF 1993. THE REAL ESTATE AGENT, SHARON HOEL -- HOEL, I GUESS THAT'S HOW YOU PRONOUNCE HER NAME. WAS IT H-O-E-L?

MR. ECHARD: THAT I'M NOT SURE, JUDGE.

THE COURT: OKAY. SHOWED THE PROPERTY TO SIX PROSPECTIVE TENANTS. AND MY NOTES ARE NOT VERY CLEAR, AND FRANKLY, MY RECOLLECTION IS NOT VERY GOOD ON THIS ISSUE, TOO, WHETHER GARY CHARLESWORTH SHOWED ALSO THE PROPERTY IN ADDITION TO WHAT SHE SHOWED OR WHETHER HE WAS JUST COUNTING WHAT SHE HAD SHOWED. BUT IN ANY EVENT, AT LEAST SIX PEOPLE SAW THE PROPERTY DURING THAT PERIOD OF TIME. WHILE THE DEFENDANT ATTEMPTED TO SUBLEASE THE PROPERTY, IT -- I'M SPEAKING OF THE CORPORATION, IT ASKED PROSPECTIVE TENANTS -- ASKED OF PROSPECTIVE TENANTS MONTHLY RENT BETWEEN 950 TO $970 A MONTH. THE COURT FINDS THAT THE FAIR RENTAL VALUE OF THAT PROPERTY NEVER EXCEEDED $900.

THE CONDITION OF THE PROPERTY DURING DEFENDANT'S ATTEMPTS TO RE-LET OR RE-LEASE THE PROPERTY WAS VERY DIRTY. THIS CONDITION COMBINED WITH EXPOSED WIRES, REMOVED FIXTURES, NO HANDICAP ACCESS, AND THE INHERENTLY SMALL SPACE AVAILABLE FOR A PROSPECTIVE TENANT MAY HAVE MADE THE PREMISES UNATTRACTIVE FOR RE-LETTING. BUT FOR WHATEVER REASON, THERE WERE NO OFFERS FROM ANY TENANTS DURING THE TIME THE -- MAUREEN -- DURING THE TIME THAT THE DEFENDANT ATTEMPTED TO SUBLEASE THE PROPERTY.

THE COURT FINDS THAT THE CEILING LEAKED IN SEVERAL PLACES IN THE PAST, LEAVING EVIDENCE OF THOSE LEAKS ON A SMALL PORTION OF THE WALL AND ON THE FLOOR IN THE FORM OF MINERAL DEPOSITS. COURT FURTHER FINDS THAT THERE WAS SOME EVIDENCE OF LEAKING FROM THE CRACK IN THE SIDE OF THE FOUNDATION THAT PERMITTED WATER FROM THE SPRINKLING SYSTEM TO ENTER THE PREMISES AND DISTURB SOME TILES ON THE FLOOR. WHILE THAT EVIDENCE OF A WATER PROBLEM WAS VISIBLE, AND I WOULD PARENTHETICALLY -- AND I WOULD FIND THAT IT WASN'T VERY OBVIOUS BECAUSE THERE WERE SOME -- THERE WAS SOME EVIDENCE THAT THAT WAS NOT OBSERVABLE, ESPECIALLY BY MR. HALE WHO CAME THROUGH IT ABOUT FIVE OR SIX TIMES, AND WHEN HE GOT READY TO LEASE IT FOR THE PLAINTIFF, AND NEVER OBSERVED ANY OF THAT. BUT I THINK IT WAS THERE TO BE SEEN BY SOMEBODY WHO WAS CRITICALLY LOOKING AT THE PREMISES. IN ANY EVENT, WHILE THAT EVIDENCE OF A WATER PROBLEM WAS VISIBLE, IT IS SPECULATIVE THAT THAT PROBLEM DETERRED PROSPECTIVE TENANTS. PARTICULARLY

GIVEN THE DIRTY CONDITION OF THE PREMISES OVER WHICH THE DEFENDANT HAD CONTROL WHILE HE -- WHILE IT ATTEMPTED TO RE-LET THE PREMISES. ALSO, PARTICULARLY THE HIGHER THAN FAIR RENTAL VALUE THAT THE DEFENDANT ATTEMPTED TO RE-LET THE PREMISES FOR, AND ALSO THE SMALL SPACE THAT EXISTED. THERE WAS EVIDENCE THAT THERE WERE PEOPLE WHO JUST WANTED MORE SPACE THAN WHAT THAT PLACE HAD TO OFFER. AND THERE WAS EVIDENCE OF AT LEAST ONE TENANT WHO WANTED A HANDICAP ACCESS. BUT I DON'T RECALL ANY EVIDENCE WHERE A TENANT CAME RIGHT OUT AND SAID, I WOULD RENT THIS BUT FOR THE LEAKING CEILING. AND BECAUSE THERE IS EVIDENCE OF A WATER PROBLEM, I'M NOT INTERESTED.

THEREFORE, IN LOOKING AT THESE PROBLEMS AND CONSIDERING WHAT A TENANT MIGHT -- PROSPECTIVE TENANT MIGHT THINK AS HE LOOKS AT MAYBE SOME EVIDENCE OF A LEAKY ROOF OR A FOUNDATION THAT LETS WATER FROM THE SPRINKLING SYSTEM COME IN, IF I WERE INTERESTED IN THAT PROPERTY, IT SEEMS TO ME THAT THESE ARE THINGS THAT COULD BE READILY REPAIRED, AND I WOULDN'T BE AS CONCERNED ABOUT THAT AS I WOULD PERHAPS THE INHERENT LIMITATION ON SPACE AND THE PRICE THAT WAS BEING OFFERED OR ASKED FOR.

FURTHERMORE, THE TESTIMONY WAS FROM THE DEFENDANT'S OWN WITNESSES THAT FILTH AND DIRT ARE DEAL KILLERS. AND THE PLACE WAS VERY DIRTY.

AFTER VACATING THE PREMISES IN MARCH OF 1993, THE DEFENDANT WAS LATE PAYING HIS RENT, SOMETIMES BEING SEVERAL

MONTHS IN ARREARS BEFORE CATCHING UP. MR. THOMAS ON BEHALF OF THE CORPORATION PRESENTED A LIST OF PROBLEMS CONNECTED WITH THE PREMISES AND SOUGHT THE PLAINTIFF'S COOPERATION IN MAKING THESE REPAIRS. SOME OF THESE REQUESTS WERE PLAINLY HIS TO MAKE UNDER THE LEASE AGREEMENT. PLAINTIFF RESPONDED REASONABLY TO THE REPAIRS THAT WERE HERS TO MAKE. THE DEFENDANT -- OR THE PLAINTIFF PROMISED TO REPAIR THE WATER PROBLEMS, BUT REASONABLY ASKED TO BE ADVISED WHEN THE ROOF LEAKED SO THAT THE LEAK OR LEAKS COULD BE IDENTIFIED, ANALYZED BY A ROOFER AND INEXPENSIVELY REPAIRED. INSTEAD OF CALLING PLAINTIFF TO HAVE HER OBSERVE AN ACTUAL LEAK SO THAT -- AND THUS TO KNOW HOW TO REMEDY THAT LEAK, DEFENDANT SEEMINGLY WANTED PLAINTIFF JUST TO REPLACE THE ROOF. THIS WAS NOT REASONABLE. THE COURT BELIEVES THAT THE DEFENDANT USED THE WATER PROBLEM AS LEVERAGE TO -- IN AN ATTEMPT TO REDUCE HIS RENT LIABILITY.

AT ANY RATE, THE DEFENDANT NEVER SHOWED OR ATTEMPTED TO SHOW THE PLAINTIFF AN ACTUAL LEAK AS IT WAS OCCURRING. AND THAT'S VERY IMPORTANT IN MY MIND. MOREOVER, DURING THE TIME THAT THE PLAINTIFF ATTEMPTED TO RE-LEASE THE PROPERTY, SHE NEVER OBSERVED IT LEAK. THAT IS, SPEAKING OF THE ROOF. AND THAT WAS DURING TIMES THAT SNOW WAS MELTING IN THE SPRING OF 1994 AND DURING TIMES THAT IT RAINED. THUS, SHE TOOK NO EFFORTS TO REPAIR THE ROOF. THE COURT FINDS THAT SHE WAS JUSTIFIED IN THIS POSITION. AND THE ALTERNATIVE WAS FOR HER

JUST -- WITHOUT KNOWING MORE ABOUT THE ORIGIN OF THOSE ROOFS, HER ONLY ALTERNATIVE WAS TO REPAIR THE WHOLE ROOF, AND THAT'S NOT ECONOMICAL. IF WE HAVE A LEAK IN THE ROOF, WE HAVE A ROOFER COME AND -- AND IDENTIFY WHERE THE LEAK IS OCCURRING, IF THERE IS ONE THERE, AND TRACE IT WHILE IT'S OCCURRING SO THAT IT CAN BE PROPERLY ANALYZED. THAT WAS NEVER DONE AND THE PLAINTIFF ALTHOUGH -- THE DEFENDANT, ALTHOUGH COMPLAINING ABOUT THE PRESENCE OF WATER, NEVER ACTUALLY SHOWED THE PLAINTIFF AN ACTUAL LEAK, BUT ONLY EVIDENCE OF WHERE IT IS, AND THAT MINIMIZED, I BELIEVE, HER CHANCES TO GO IN AND REALISTICALLY LOOK AT IT. AND I THINK THAT, COMBINED WITH THE FACT THAT DURING THE TIME THAT SHE LOOKED AT IT, AND HAD IT IN HER POSSESSION DURING TIMES OF SNOW MELTING AND IT RAINING, SHE NEVER SAW IT ACTUALLY LEAK, I THINK SHE WAS JUSTIFIED IN DOING NOTHING.

COURT FINDS THAT UPON RECEIVING THE PREMISES BACK, THE PLAINTIFF ENGAGED A REALTOR TO RE-LEASE THE PREMISES OR TO MITIGATE DEFENDANT'S DAMAGES. PLAINTIFF SUCCEEDED IN RE-LEASING THE PROPERTY ON OCTOBER 15, 1994 TO JAMES HINES, DOING BUSINESS AS WASATCH FLORAL. AFTER THE PROPERTY HAD STOOD VACANT FOR ONE AND A HALF YEARS, WHICH HINES WAS AWARE OF AND OBVIOUSLY USED IN HIS NEGOTIATIONS WITH THE PLAINTIFF -- LET MY CHIME RUN ITS COURSE.

MR. ECHARD: OKAY.

THE COURT: IT'S JUST TOO HARD TO SPEAK OVER THE

CHIME OF MY CLOCK.

AND THE PLAINTIFF NOW BEING DESPERATE TO RE-LEASE THE PROPERTY BECAUSE SHE HAD NOT RECEIVED RENT PAYMENTS FOR TEN MONTHS, THAT IS, SINCE DECEMBER OF 1993, AND SHE HAD A MORTGAGE PAYMENT TO MEET, SHE ACCEPTED HINES AS A TENANT AT THE RATE OF $600 A MONTH FOR THREE YEARS WITH AN OPTION FOR AN ADDITIONAL THREE YEARS AT $700 A MONTH. THE PREMISES WERE LEASED TO MR. HINES ON AN AS IS BASIS. THAT IS, THERE WAS NO REMODELING ALLOWANCE, AND HE WANTED ONE. UNDER THE EVIDENCE, SHE WAS NOT WILLING TO DO THAT. AND HE, THEREFORE, WAS NOT WILLING TO PAY THE $900 A MONTH WHICH SHE ASKED FOR, AND FINALLY SETTLED UPON $600, AND THROUGH THAT REDUCED RENTAL, HE THEN COULD JUSTIFY TAKING THE PREMISES AND RENTING THEM OR REMODELING THEM.

DEFENDANT'S PROMISE TO REPAIR THE WATER PROBLEMS -- EXCUSE ME. LET ME START AGAIN. DEFENDANT'S REFUSAL TO PAY THE RENT WAS UNREASONABLE, ESPECIALLY WHEN PLAINTIFF OFFERED THROUGH HER COUNSEL TO ESCROW THE RENT MONEY TO REMEDY THE PURPORTED LEAKS. COURT RULES AS A MATTER OF LAW THAT THE DEFENDANT WAS OBLIGATED TO PAY THE RENT AND TO SUE FOR DAMAGES.

THE COURT FINDS NO CONSTRUCTIVE EVICTION THAT WOULD WARRANT THE DEFENDANT ABANDONING THE PREMISES. AND THAT WOULD BE THE CASE EVEN IF THE DEFENDANT HAD STILL BEEN OCCUPYING THE PREMISES.

COURT FURTHER FINDS THAT THE PREMISES WERE VERY HABITABLE. AND THERE IS ALSO A QUESTION IN MY MIND WHETHER THE DOCTRINE OF HABITABILITY WOULD APPLY TO A COMMERCIAL LEASE, ANYWAY.

DEFENDANT'S REFUSAL TO PAY THE LEASE PAYMENTS WAS A BREACH OF CONTRACT OR OF THE LEASE. COURT, THEREFORE, RULES THAT THE PLAINTIFF IS ENTITLED TO AND WILL ACCEPT THE DAMAGE REQUEST AS DELINEATED IN PLAINTIFF'S EXHIBIT NUMBER 10. FOR THE RECORD, PLAINTIFF IS ENTITLED TO THE LEASE PAYMENTS FROM JANUARY OF 1994 THROUGH OCTOBER 14, 1994 AT $900 PER MONTH. OR 10.5 MONTHS -- WAIT A MINUTE. WOULD THAT BE RIGHT OR WOULD IT BE 9.5 MONTHS?

MR. BLACKBURN: I THINK IT WOULD BE 9.5 MONTHS, YOUR HONOR.

THE COURT: I THINK THE SCHEDULE IS WRONG. I THINK IT WOULD BE 9.5 MONTHS, SO WE'LL NEED TO MAKE THAT ADJUSTMENT IN THAT AMOUNT. MAYBE YOU'VE GOT THE CORRECT AMOUNT THERE. BUT IN ANY EVENT, IT WOULD BE THE $900 A MONTH AT 9.5 MONTHS.

SHE IS ALSO ENTITLED TO LEASE PAYMENTS FROM OCTOBER 15, 1994 THROUGH FEBRUARY 11, 1996 AT $300 A MONTH OR 16 MONTHS AT $300 A MONTH, WHICH IS THE DIFFERENCE THEN BETWEEN WHAT SHE IS RECEIVING FROM MR. HINES AND WHAT THE DEFENDANT WAS OBLIGATED TO PAY.

SHE IS ALSO ENTITLED TO -- THE COURT RULES THAT DAMAGES CONTINUE TO ACCRUE FOR THE DURATION OF THE LEASE. AND THE

PLAINTIFF MAY PERIODICALLY BRING A MOTION TO AUGMENT THIS JUDGMENT.

COURT WILL ALSO AWARD HER A REASONABLE REALTOR FEE OF $1,800 THAT SHE HAD TO PAY TO RE-LEASE THE PROPERTY. IF THAT LEASE PAYMENT IS DUE AND PAYABLE. I THINK THE EVIDENCE WAS THAT SHE HAD PAID $600 OF IT, BUT I ASSUME FROM THE EVIDENCE THAT THAT'S ALL SHE HAD PAID, BUT THAT DOES NOT REDUCE HER LIABILITY.

MR. BLACKBURN AND MR. ECHARD, I DON'T RECALL ANY EVIDENCE ON ATTORNEY'S FEES. DID ANYBODY ASK FOR THOSE?

MR. BLACKBURN: WE ASKED FOR THEM AND WE HAD ENTERED INTO A STIPULATION THAT IF THERE WAS A PREVAILING PARTY THAT WE WOULD SUBMIT THOSE BY AFFIDAVIT.

THE COURT: ALL RIGHT. YOU MAY DO THAT.

MR. BLACKBURN: THEN THE OTHER PARTY WOULD HAVE A CHANCE TO OBJECT TO THEM IF THEY SO DESIRED.

THE COURT: RIGHT. COURT WILL ADD TO THE JUDGMENT REASONABLE ATTORNEY'S FEES.

MR. BLACKBURN, YOU ARE TO PREPARE PLEASE FINDINGS OF FACT CONSISTENT WITH THIS OUTLINE. YOU MAY SUPPLEMENT WHATEVER I HAVE GIVEN TO YOU IN THIS OUTLINE THAT YOU BELIEVE ARE FAIRLY AND REASONABLY RAISED BY THE PLEADINGS, AND THEN PREPARE CONCLUSIONS OF LAW AND A JUDGMENT CONSISTENT WITH THEM IN THIS RULING. ARE THERE QUESTIONS?

MR. ECHARD: NOT FROM ME, YOUR HONOR. I WOULD LIKE

TO SEE A COPY OF THE TRANSCRIPT. I ASSUME YOU'RE GOING TO GET THAT, TIM.

MR. BLACKBURN: YEAH, I'LL GET A COPY OF THE TRANSCRIPT. DEAN, CAN YOU PREPARE ME A COPY OF THE TRANSCRIPT?

THE REPORTER YES.

MR. BLACKBURN: I'LL DO THAT, YOUR HONOR. I HAVE NO QUESTIONS.

MR. ECHARD: BEING THE HOLIDAYS, I WOULD REQUEST THAT IF IT IS SENT TO ME FOR APPROVAL TO FORM THAT WE HAVE SOME TIME TO GET THROUGH THE CHRISTMAS VACATION BECAUSE I'M NOT GOING TO BE ABLE TO GET THROUGH ALL OF THAT THING DURING THAT TIME AND YOU'VE OBVIOUSLY GOT TO HAVE SOME TIME TO PREPARE IT.

MR. BLACKBURN: YEAH, WE CANNOT -- I'LL PROBABLY GET IT TO YOU AFTER CHRISTMAS.

MR. ECHARD: THAT SOUNDS FAIR.

MR. BLACKBURN: BY THE TIME I GET THE TRANSCRIPT AND GET IT DONE.

THE COURT: ALL RIGHT. THANK YOU. IF THERE IS A PROBLEM, LET ME KNOW.

MR. BLACKBURN: ALL RIGHT. BYE.

THE COURT: BYE.

*****

CERTIFICATE

STATE OF UTAH)
) SS
COUNTY OF WEBER)

THIS IS TO CERTIFY THAT THE FOREGOING 11 PAGES OF TRANSCRIPT CONSTITUTE A TRUE AND ACCURATE RECORD OF THE PROCEEDINGS TO THE BEST OF MY KNOWLEDGE AND ABILITY AS A CERTIFIED SHORTHAND REPORTER IN AND FOR THE STATE OF UTAH.

DATED AT OGDEN, UTAH THIS 19TH DAY OF DECEMBER 1994.

_____
DEAN OLSEN, C.S.R.

VAN COTT, BAGLEY, CORNWALL & McCARTHY
Timothy W. Blackburn - #0355
Attorneys for Plaintiff
2404 Washington Boulevard, Suite 900
Ogden, Utah 84401
Telephone: (801) 394-5783

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY

STATE OF UTAH

SHEREE HEWETT, Plaintiff, vs. D&S CORPORATION dba INTERMOUNTAIN PRINT/TYPE TECH, Defendant.	FINDINGS OF FACT AND CONCLUSIONS OF LAW Civil No. 940900191 Honorable Michael D. Lyon

FEB 2 4 1995

The above matter came regularly for trial before the Honorable Michael D. Lyon, one of the judges of the above court, on the 14th day of November, 1994. The plaintiff was present and represented by her attorney, Timothy W. Blackburn, and the defendant corporation was present and represented by its attorney, Robert A. Echard, and the court having taken the matter under advisement and the court having made its Ruling on December 19, 1994, and the court being fully apprised in the premises, enters its Findings of Fact and Conclusions of Law as follows:

1. The plaintiff leased the property at 3772 Washington Boulevard to the defendant corporation under a Lease Agreement dated January 21, 1991.

2. Pursuant to the terms of the Lease Agreement, defendant agreed to pay the plaintiff annual rent of $10,800.00 at a monthly rental of $900.00 commencing February 11, 1991.

3. The term of the lease is five years.

4. In March of 1993, the defendant voluntarily vacated the premises for business reasons.

5. Prior to vacating, the defendant never complained to the plaintiff about any of the complaints and particularly the water damage that are subject to this law suit.

6. By the defendant's own evidence, the water problems and the other problems identified were never observed or mentioned, except the problem with the sprinkling system and its occasionally leaking into the premises.

7. Two weeks after vacating, the defendant engaged a realtor who showed the property to prospective tenants during a period of early summer through November of 1993. The real estate agent showed the property to six prospective tenants.

8. While the defendant attempted to sublease the property, the defendant asked the prospective tenants for monthly rent between $950.00 to $970.00 a month.

9. The court finds that the fair rental value of the property never exceeded $900.00.

10. The condition of the property during defendant's attempts to sublease the property was very dirty. This condition combined with exposed wire, removed fixtures, no handicap access, and the inherently small space available for a prospective tenant made the premises unattractive for sub-leasing.

11. There were no offers from any tenants during the time that the defendant attempted to sub-lease the property.

12. The ceiling leaked in several places in the past, leaving evidence of those leaks on a small portion of the wall and on the floor in the form of mineral deposits.

13. There was some evidence of leaking from the crack in the side of the foundation that permitted water from the sprinkling system to enter the premises and disturb some floor tiles.

14. While there was some evidence that a water problem was visible, it was not very obvious because Mr. Hale, the realtor hired by plaintiff, came through the property about five or six times when he got ready to lease it for the plaintiff and never observed any leaking.

15. If someone was critically looking at the premises, the leak was visible.

16. In any event, while the evidence of a water problem was visible, it is speculative that that problem deterred prospective tenants. Particularly given the dirty condition of the premises over which the defendant had control while it attempted to sub-lease the premises.

17. The prospective tenants that may have been interested in the property wanted more space than the place had to offer.

18. Also one of the prospective tenants wanted a handicap access.

19. There were no prospective tenants that made an offer on the property or even said they would lease the property but for the leaking ceiling.

20. The leaking roof and the leak through the foundation were not sufficient that a tenant would not lease the property as the leaks could have readily been repaired.

21. The property was not being sub-leased because of its limitation on space, its condition, and the price that the defendant wanted for the sub-lease.

22. The defendant's own witnesses testified that the filth and dirt are deal killers and the court has found that the property was dirty.

23. After the defendant vacated the property in March of 1993, the defendant was late paying his rent, sometimes several months in arrears before catching up.

24. Mr. Thomas, on behalf of the corporation, presented a list of problems connected with the premises and sought the plaintiff's cooperation in making these repairs.

25. Some of these repairs requested were plainly the defendant's to make under the terms of the lease.

26. The plaintiff responded reasonably to the repairs that were hers to make.

27. The plaintiff promised to repair the water problems but reasonably asked to be advised when the roof leaked so that the leak or leaks could be identified, analyzed and inexpensively repaired.

28. The defendant, instead of calling the plaintiff to have her observe the actual leak and thus to know the remedy for the leak, the defendant seemingly wanted plaintiff just to replace the entire roof. This is not reasonable.

29. The court finds that the defendant used the water problem as leverage to attempt to reduce his rental liability.

30. The defendant never showed or attempted to show the plaintiff an actual leak as it was occurring. During the time the plaintiff attempted to sub-lease the property, she never observed the roof leaking and this was during a period of

time when the snow was melting in the spring of 1994 and during the times when it rained. The plaintiff, because she could not find the leaks, took no efforts to repair the roof.

31. The court finds that the plaintiff was justified in this position. If there is a leak in the roof, the plaintiff would have had a roofer come, identify the leak, and repair it. The plaintiff, while she had had the property and was sub-leasing it, could never identify any leaks.

32. The plaintiff received the premises back and the plaintiff engaged a realtor to lease the premises to mitigate her damages.

33. The plaintiff succeeded in leasing the property on October 15, 1994, to James Hines, doing business as Wasatch Floral.

34. The property had stood vacant for a year and a half which Hines was aware of and obviously used in his negotiating with the plaintiff.

35. Plaintiff was desperate to lease the property because she had not received rent payments for ten months and she was making the mortgage payments. The plaintiff leased the property to Mr. Hines at a rate of $600.00 a month for three years with an option for an additional three years at $700.00 a month.

36. The premises were leased to Mr. Hines on an as is basis, and there was no remodeling required by the plaintiff. Mr. Hines had wanted the plaintiff to remodel the premises; however, she was not willing to do that for the rent that he offered. Mr. Hines and the plaintiff negotiated the rental and finally settled on $600.00 per month although that is somewhat of a reduced rental and with that reduced rental, Mr. Hines could justify taking the premises and renting them or remodeling them. The plaintiff leased the property to Mr. Hines at a reasonable rental value.

37. The plaintiff mitigated her damages.

38. The defendant's refusal to pay the rent was unreasonable, especially when plaintiff offered through her counsel to escrow the rent money to remedy the purported leaks.

39. The defendant was obligated to pay the rent and to sue for the damages.

40. The defendant was not constructively evicted from the premises that would warrant the defendant abandoning them. The premises were very habitable.

41. The defendant's refusal to pay the lease payments was a breach of the Lease. The plaintiff has suffered damages as follows: The lease payments from January of 1994 through October 15 of 1994 at $900.00 per month which is 9.5 months. The plaintiff is entitled to damages in the sum of $300.00 a

month from October 15, 1994, through January 15, 1995, at $300.00 per month which is a difference between what she is receiving from Mr. Hines and what the defendant was obligated to pay. Said amount totals $9,450.00.

42. The court also rules that the plaintiff is entitled to damages to accrue for the duration of the lease; however, a judgment will not be entered for those amounts until they have actually accrued.

43. This case will be kept open whereby the plaintiff may augment her judgment for those amounts once they have accrued.

44. The court finds that the plaintiff has suffered damages in the sum of $1,800.00 that she was required to pay for her realtor to sub-lease the property.

45. Plaintiff is entitled to her attorney fees, to be submitted by affidavit. If the defendant disputes her attorney fees, then the defendant may request a hearing strictly for the purpose of determining attorney fees.

46. The plaintiff is entitled to her costs for maintaining this action.

WHEREFORE, from the above Findings of Fact, the court enters its Conclusions of Law as follows:

1. The plaintiff did not constructively evict the defendant.

2. Plaintiff is entitled to a judgment against the defendant in the total sum of $11,250.00 through January 15, 1995, plus attorney fees of $3,366.25 and court costs of $154.50.

3. The case shall remain open and the plaintiff may petition the court and a hearing will be set to determine the plaintiff's damages subsequent to January 15, 1995.

4. This Judgment shall be augmented in the amount of reasonable costs and attorney's fees expended in collecting said Judgment by Execution or otherwise as shall be established by Affidavit.

DATED this 24 day of February, 1995.

BY THE COURT:

Michael D. Lyon

MICHAEL D. LYON
District Judge

Pursuant to 4-504 of the Judicial Administration, the undersigned will submit the foregoing to the Honorable Michael D. Lyon, District Court Judge, for signature upon the expiration of eight (8) days from the date this notice is mailed to you, unless written objection is filed prior to that time.

I hereby certify that on the 7th day of February, 1995, I mailed a true and correct copy of the foregoing to

Robert A. Echard, attorney for defendant, at 2491 Washington Boulevard Suite 200, Ogden, UT 84401, by U.S. mail, postage prepaid.

Secretary

VAN COTT, BAGLEY, CORNWALL & McCARTHY
Timothy W. Blackburn - #0355
Attorneys for Plaintiff
2404 Washington Boulevard, Suite 900
Ogden, Utah 84401
Telephone: (801) 394-5783

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY

STATE OF UTAH

SHEREE HEWETT, Plaintiff, vs. D&S CORPORATION dba INTERMOUNTAIN PRINT/TYPE TECH, Defendant.	JUDGMENT Civil No. 940900191 Honorable Michael D. Lyon

FEB 2 4 1995

The above matter came regularly for trial before the Honorable Michael D. Lyon, one of the judges of the above court on November 14, 1994, and the matter was taken under advisement by the court. The court entered its Ruling on December 19, 1994, and the court having entered its Findings of Fact and Conclusions of Law, enters its Judgment as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff has judgment against the defendant for the sum of $11,250.00 through January 15, 1995, plus a reasonable attorney fee of $3,366.25 and court costs of $154.50.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the case shall remain open, and the plaintiff may petition the court and a hearing will be set to determine the plaintiff's damages subsequent to January 15, 1995.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this Judgment Shall be augmented in the amount of reasonable costs and attorney's fees expended in collecting said Judgment by Execution or otherwise as shall be established by Affidavit.

DATED this 24 day of February, 1995.

BY THE COURT:

STATE OF UTAH }
COUNTY OF WEBER } ss:

I Hereby Certify That This Is A True Copy Of The Original On File In My Office
DATED THIS 14 DAY OF Apr 1995
PAULA CARR
CLERK OF THE COURT
BY Irene Cochran DEPUTY

MICHAEL D. LYON
District Judge

Pursuant to 4-504 of the Judicial Administration, the undersigned will submit the foregoing to the Honorable Michael D. Lyon, District Court Judge, for signature upon the expiration of eight (8) days from the date this notice is mailed to you, unless written objection is filed prior to that time.

I hereby certify that on the 7th day of February, 1995, I mailed a true and correct copy of the foregoing to Robert A. Echard, attorney for defendant, at 2491 Washington

Boulevard Suite 200, Ogden, UT 84401, by U.S. mail, postage prepaid.

Secretary